

NO. 3306

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

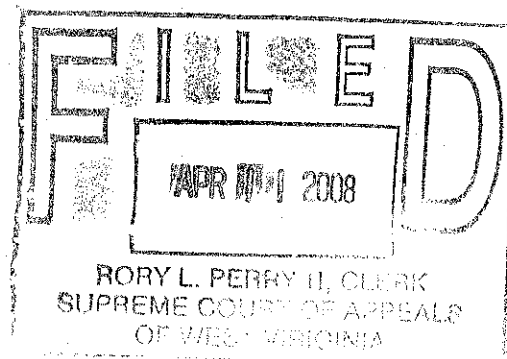
WILLIAM T. SMOOT, II,
By his next of friend, KARI MAJOR,

Appellant,

v.

**AMERICAN ELECTRIC POWER,
VERIZON OF WEST VIRGINIA, INC.
And CHARTER COMMUNICATIONS, INC.**

Appellee.



REPLY BRIEF OF THE APPELLANT, WILLIAM T. SMOOT, II
by this next friend, KARI MAJOR

**ON APPEAL
FROM THE CIRCUIT COURT OF KANAWHA COUNTY**

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WILLIAM T. SMOOT, II,
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Appellees.

APPELLANT'S REPLY BRIEF

Although this matter has been well and fully briefed by the parties, the Appellant, William T. Smoot, II, by his next of friend, Kari Major, files this short Reply for the purpose of clarifying several critical facts, reiterating the appropriate and applicable National Electric Safety Code standard and responding to a new argument advanced by the Appellees regarding William Smoot's recovery.

I. WILLIAM SMOOT DID NOT SEPARATE FROM HIS BICYCLE PRIOR TO STRIKING THE UNMARKED GUY WIRES

Abundant, uncontroverted eyewitness testimony supports William Smoot's contention that he was upright and on his bicycle at the time he struck the Appellees unmarked guy wires. Melba Farley, **the one and only adult eyewitness**, specifically stated that William Smoot "hit the guy wires and fell backwards and flew off the bike". She stated that it looked like maybe his shoulder hit one of the guide wires. When asked if she saw the guide wire move at all, Ms. Farley responded "I saw it shake a little bit when he flew off the bike; it looked like maybe his shoulder hit it." (See Page 2 of **Melba Farley** Statement attached hereto as **Exhibit A.**) Furthermore, according to Smoot, and other eyewitness testimony, he was on his bicycle and in control of his bicycle when he went over the hillside. (See, **Smoot Deposition** Transcript at Page 47 and **Andrew Morrison Deposition** Transcript at Pages 24, 25 and 27) Finally, it was Smoot's testimony and belief that he could have avoided the guy wires if he could have seen the wires as he descended the hillside in Anna Farley's yard. Unfortunately, William Smoot could not and did not see the unmarked guy wires which easily blend into the trees and grass. By failing to properly mark the guy wires so that the wires could be seen by unsuspecting travelers, the Appellees breached their duty to William Smoot and are liable for the resulting injuries.¹

1. Appellees statement that "there simply is not even a scintilla of evidence that he was steering down the steep embankment and only wrecked his bicycle after he hit the guy wires which were not visible to him" is completely contrary to the unequivocal eyewitness statements. The Appellees do not identify nor proffer a single witness to contradict Melba Farley, Andrew Morrison, Josh Harper or William Smoot version of how the crash evolved and William Smoot's contact with the unmarked guy wires.

II. THE TIME OF DAY WAS NOT A FACTOR CONTRIBUTING TO WILLIAM SMOOT'S INABILITY TO SEE THE UNMARKED GUY WIRES

William Smoot, his younger brother, Trey and three of his friends were riding their bicycles on **August 12, 2003** during their **Summer Vacation** from school. The Appellees infer that the time of day may have contributed to William Smoot's inability to see the unmarked guy wires. Specifically, on Page Three (3) of their Brief, the Appellees state that "the accident occurred **close to dusk**" suggesting that the time of day William Smoot crashed into the unmarked wires lessens their legal responsibility to mark the guy wires. A simple review of the time of year, the time of day and the definition of "**dusk**" will eliminate the Appellees suggestion that something other than the Appellees dereliction of duty caused William Smoot's injuries.

The Kanawha County Emergency Ambulance Authority records indicate that the emergency call regarding William Smoot's injuries was received at 8:01 p.m. (See Page 1 of **Kanawha County Emergency Ambulance Authority Record** attached hereto as **Exhibit B**) Common sense dictates that the crash occurred **sometime before** the Emergency Services were beckoned, i.e. sometime before 8:00 p.m. According to **Merriam Webster Dictionary**, **dusk** refers to the twilight **after sunset**. Merriam Webster Dictionary also clarifies that **dusk should not be confused with sunset**, which is the moment when the trailing edge of the sun itself sinks below the horizon. On August 12, 2003, the sunset in Charleston, West Virginia occurred at 8:24pm. (See, Sun Rise and Sunset Calculator for Charleston, West Virginia. Attached hereto as **Exhibit C**) Thus, by definition, "dusk" would have occurred sometime after 8:24 p.m.

William Smoot crashed into the unmarked guy wires before 8:00 p.m. i.e. long before the sunset occurred in Charleston, West Virginia and long, long before "dusk" occurred in Charleston, West Virginia. The Appellees argument that the time of day contributed to William Smoot's inability to see the unmarked guy wires is without merit and clearly lacking in factual support. The argument is nothing more than a "red herring" intending to divert this Court's attention from the real issue; by failing to properly mark the guy wires so that the wires could be seen by unsuspecting travelers, the Appellees breached their duty to the William Smoot and are liable for the resulting injuries.

III. The National Electric Safety Code Creates an Unequivocal Duty to Mark Guy Wires Exposed to Pedestrian Traffic

All parties agree that the **National Electric Safety Code ("NESC")** governs the requirements imposed upon the utility companies in this case to have markers on the guy wires in question. The NESC contains the standards which cover the basic provisions for safeguarding persons from hazards which may arise from the installation, operation and maintenance of electrical supply and communication systems. The NESC has been adopted by the West Virginia Public Service Commission and provides stellar support for the position that the Appellees owed a duty to William Smoot.

In particular, the NESC includes specific standards for the marking of guy wires in **Section 264E**, and provides as follows:

A. Guy Markers and Protection

1. The ground end of anchor guys **exposed** to pedestrian traffic **shall** be provided with a substantial and conspicuous marker.
2. Where an anchor is located in an established parking area, the guy shall either be protected from vehicle contact or marked.
3. Nothing in this rule is intended to require protection or marking of structural components located outside of the traveled ways of the roadways or established parking areas. Experience has shown that it is not practical to protect structures from contact by out of control vehicles operating outside established roadways.

The NESC clearly requires the Appellees to mark or guard wires located in an area **exposed** to pedestrians. The plain and simple definition of "exposed" can be found in the **Merriam-Webster** dictionary which provides as follows:

Ex-posed

Pronunciation: \ik-'spōzd\

Function: *adjective*

Date: circa 1623

1: open to view

2: not shielded or protected; *also*: not insulated

<an *exposed* electric wire>

synonyms see **LIABLE**

<http://www.merriam-webster.com/dictionary/exposed>

Clearly, the relevant guy wires fall squarely within the definition of "exposed" as they are "open to view", are "not shielded or protected" and are "not insulated." Clearly, the relevant guy wires are exposed to those who mow the grass in Anna Farley's yard, are exposed to any child riding a bicycle on the nearby roadway or down the hillside, are exposed to any child chasing a ball over the hillside and are exposed to any pedestrian who chooses to transverse the green, grassy hillside as a short cut to other areas of the subdivision. Finally, the relevant guy wires are merely 19 feet or 6 yards away from the roadway. This minimal distance is **less than the distance** required for a first down (10 yards) in a sandlot football game, i.e. a game historically played in neighborhoods with kids. Obviously, the relevant guy wires were exposed to pedestrian traffic and require marking such as with markers with color or color patterns that provide contrast with the surroundings. (W.Va. C.S.R. 150-3-5)

Contrary to the Appellees argument that the "guy wires are located in an area where pedestrians would not normally have access **absent extraordinary circumstances**", the parties, counsel for the parties and the parties' experts were not part of an "extraordinary circumstance" when walking in or around the unmarked exposed wires conducting post accident inspections. To the contrary, the Appellee, Verizon's engineer, Ricky Myers stated that he had complete pedestrian access to the pole for his post crash inspection and that the grass is kept mowed around the poles and wires. Furthermore, AEP Line Specialist, James Hannah, unequivocally testified that a child could ride his bicycle or walk in the area where the guy wires were located.

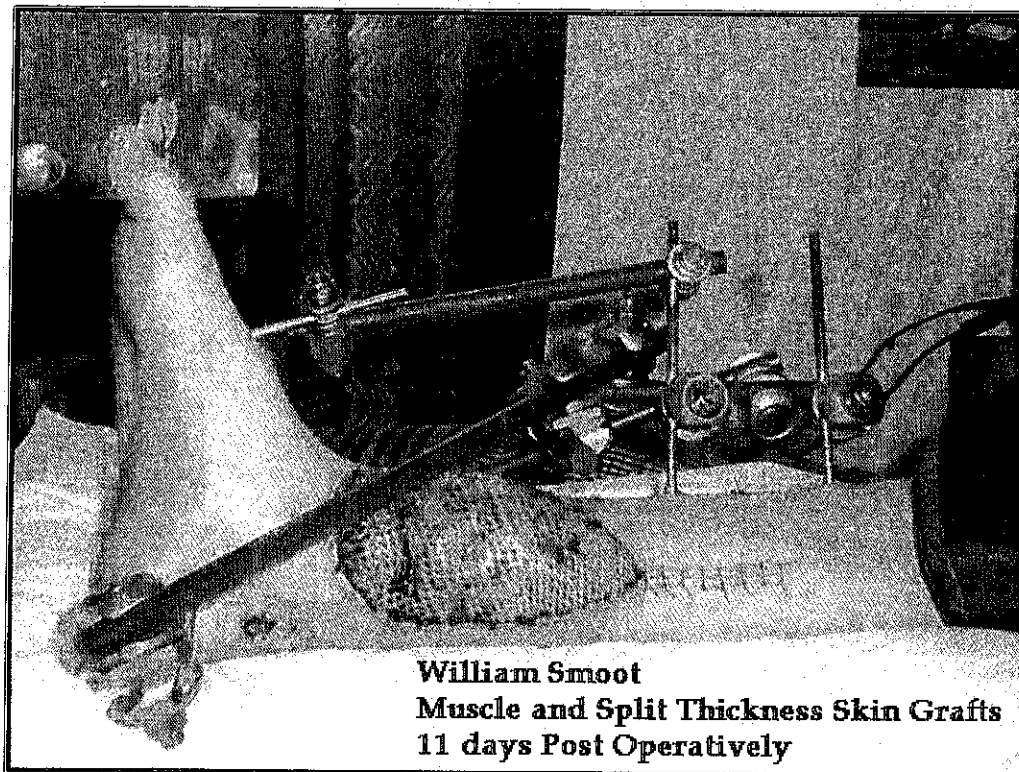
The Appellant's expert, James Taylor explained that "during my inspection, I had complete pedestrian access to the site and no problem walking to the site or any objection from the property owner". The evidence clearly and unequivocally shows that the relevant guy wires were "open to view", "not shielded or protected" and "not insulated" in other words and by definition "exposed". Therefore, and as a matter of law, the Appellees owed a duty to William Smoot to mark the guy wires and consequently, the lower court erroneously granted summary judgment to the Appellees.

IV. William Smoot sustained catastrophic permanent injuries to his right leg² with Expected Life Care Costs to exceed \$480,000.00

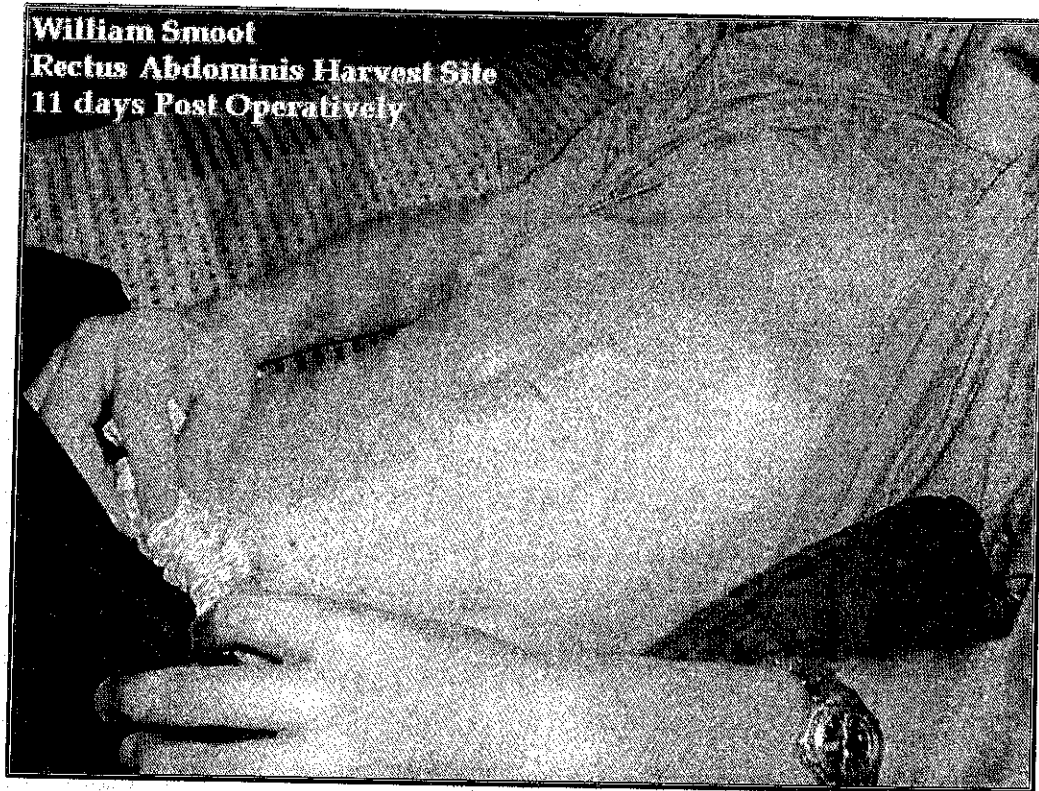
The Appellees make a somewhat weak but poignant attempt to mislead this Court to into believing that William Smoot's injuries were insignificant and that he is back to normal "pre-accident activities". However, nothing could be further from the truth. In fact, no less than ten (10) surgeries have been performed on William Smoot right lower leg. Beginning on **August 12, 2003** (the day of the crash) to **April 13, 2006**, when he underwent a surgical procedure to remove the growth plate in his **healthy leg**; William Smoot has been forced to undergo unimaginable medical procedures and endure indescribable pain.

² Appellees incorrectly referred to William Smoot's injured leg as his "left lower leg" on Page 6 of their Brief when indeed it was his right lower leg that was nearly severed.

It is somewhat troubling that the Appellees attempt to use Dr. Russell Biundo's deposition testimony regarding William Smoot's use of a skateboard as a springboard to illustrate a "significant recovery."



First, it must be noted that Russell Biundo, M.D. is a catastrophic injury specialist located in Morgantown, West Virginia. William Smoot was referred to Dr. Biundo due to Dr. Biundo's expertise in treating patients who suffer catastrophic injuries. Examples of the type of patients treated by Biundo are patients who suffer severe traumatic brain injuries from car accidents, gunshot wounds, patients who suffer paraplegia, paralysis of the lower extremities, or quadriplegia.



Dr. Buindo describes his patients as having "injuries that are categorized as being catastrophic, anything that impairs or disables that individual and affects their quality of life." (See, Buindo Deposition at Pages 8 and 9 attached hereto as Exhibit D).

After conducting his initial assessment of William Smoot, Dr. Buindo acknowledged that William had a severe injury to his right lower leg including a significant fracture and nerve damage. Dr. Buindo acknowledged definite evidence of growth plate dysfunction which created a talar tilt and weakness of the toe flexors and well as tightness of the Achilles tendon. Finally, Dr. Buindo recognized posterior tibial nerve damage and the need for surgical intervention to correct the growth plate asymmetry.

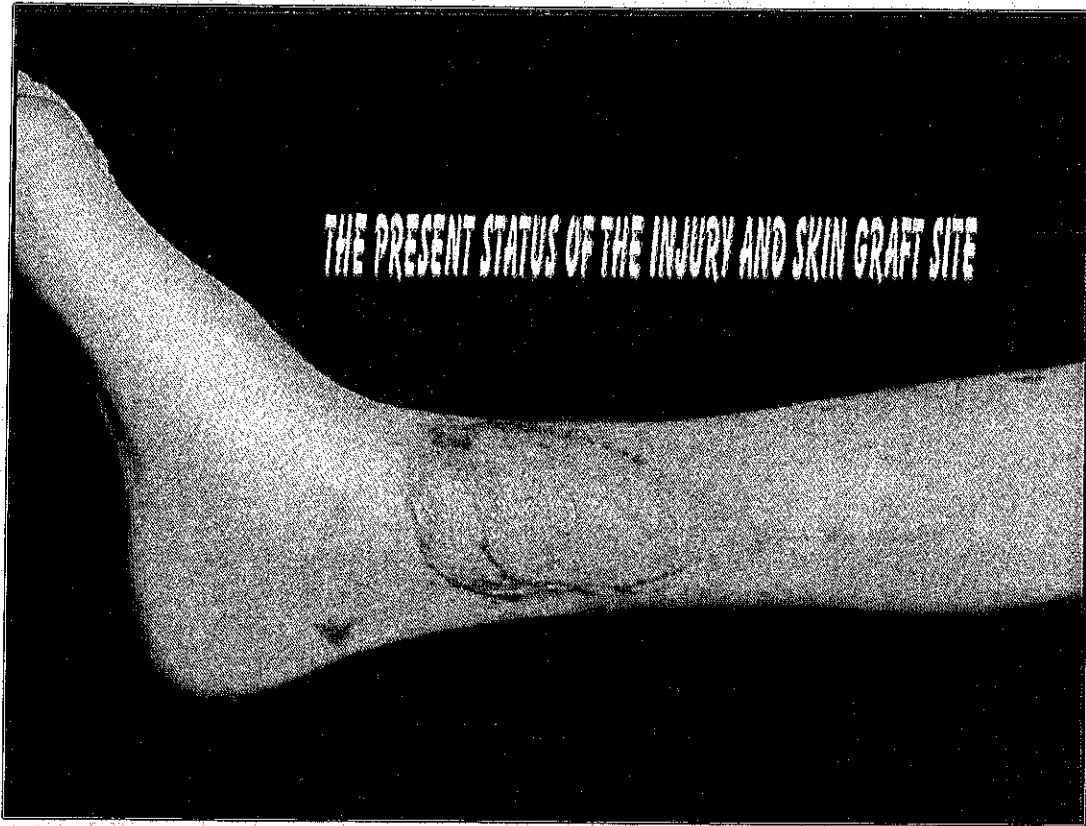
With respect to William Smoot making a "significant recovery", Dr. Biundo stated that "he does so well because he compensates so beautifully, that it's really not affecting him at this point, as children do." Dr. Biundo points out that "I have children that have congenital amputations, and you give them a little prosthesis, man, they fly, and they'll never complain". (See Biundo Deposition at Page 55, attached hereto as **Exhibit E**).

Significantly, following his visits with Dr. Biundo, William Smoot was evaluated by Life Care Planner and Rehabilitation expert, Patricia A. Sporer, RN, BSN. **(Patricia Sporer was deposed by Appellees on March 1, 2006)** With regard to William Smoot's recovery and "use of a skateboard", Rehabilitation Expert, Patricia Sporer has opined that William Smoot's age needs to be remembered pointing out that healing without full recovery for the young is far easier than someone older. Ms. Sporer, however, cautions that "easier recovery" only includes the initial years. On the dimmer side, trauma in the young allows for a longer life that dictates a longer period of stress to the joint. The ongoing stress relates to changes that occur within the leg, ankle, and foot itself and for which compensation must be made by the injured child. So, even though the young have a faster healing/recovery rate, it **does not mean** that they will be exempt from deterioration, pain, surgeries, and the long-term effect of trauma. Ms. Sporer's opinion has been validated by the latest surgery William Smoot endured on April of 2006, to remove the growth plate in his healthy leg.

According to Patricia Sporer, injuries tend to have a "honeymoon stage of 8 to 10 years". Specifically, the individual is able to compensate well for the injury (as the young are able to do), but eventually that grace period ends. Then the person is faced with the terms of aging, overuse, compensation and the multitude of changes that occur with trauma injuries and abnormal use. William Smoot is already showing signs of ongoing arthritis pain. It is predicted by Patricia Sporer that within ten years, William Sporer will be limping and within twenty years, he will be using a cane to restrict pressure to the right ankle (if he has to walk long distances). But since using a cane seems to be a visible representation of weakness (as perceived by males), he most likely will restrict mobility and activity to be more socially acceptable.

Appellees have pointed to William Smoot's use of a skateboard as indicative of a "significant recovery." But, and as noted by Patricia Sporer, in utilizing a skateboard William Smoot has found a transport vehicle that is socially acceptable to his peers. The skateboard decreases the stress/hammering to the ankle that ambulation adds, limits repetitive action of the ankle movement, decreasing pain; provides endurance to encompass distance while conserving energy for the task instead of expending the energy on transport. A great deal is accomplished with the skateboard, as well as overcoming the stigma of disability that would be revealed in physical games. The skateboard is serving as a very in-expensive mobility unit to immobilize the joint and relieve stress from the right ankle. Finally, the skateboard offers tremendous stress to be relieved from putting the ankle and foot through misaligned movements

(inversion/eversion) that is, following injury, an abnormal compensatory motion that must be used for functional ambulation.



To William Smoot's disadvantage, he works very hard at looking normal; his compensatory measures are remarkable as noted both in report and in person by Dr. Biundo. When one sees how far William Smoot twists/rotates his right ankle for inversion for a compensatory gait, one realizes how much effort Will places on appearing normal. To his disadvantage, with pant legs covering the ankle and foot and a slight rolling from side to side (compensation), his gait appears within normal

limitations. So, because Will "looks so good" and "because he compensates so well", he is penalized to **minimal replacement factors**. However, there is sufficient medical documentary evidence to support the mechanical and debilitating changes to the right ankle that can neither be faked nor corrected. William Smoot is now left to live with a severely deformed and sometimes functional right leg.

V. There is a Complete Absence of Evidence that Mandatory Inspections of the Relevant Guy Wires Were Conducted by any of the Utilities

Appellees concede that they are required to inspect the guy wires pursuant to Rule 214 of the National Electric Safety Code. (See Page 16 of Appellee's Brief).

In relevant part the rule states:

NESC RULE 214 – Inspection of Tests of Lines and Equipment:

a. WHEN IN SERVICE

1. INSPECTION

Lines and equipment shall be inspected as such intervals as experience has shown to be necessary

5. REMEDYING DEFECTS

Lines and equipment with recorded defects that could be reasonably expected to endanger life or property shall be promptly repaired, disconnected or isolated.

The Appellees plead with this Court not to consider the Appellant's argument that mandatory inspections which would have revealed the exposed dangerous condition created by the unmarked guy wires were not conducted. In support of their position, the Appellees **incorrectly** represent to this Court that "the Appellant boldly makes the

allegation that the Appellees failed to properly inspect the lines – without asking any of the Appellees interrogatories requesting information relating to inspections of the lines.” (See, Page 17 of Appellees Brief). The record clearly contradicts the Appellees position and completely supports William Smoot’s position.

On **June 13, 2005**, a Third Set of Interrogatories and Second Set of Request for Production of Documents were served by William Smoot upon all three (3) defendants. The Second Set of Request for Production of Documents contained the following requests:

Request No. 2. Please produce **Verizon of West Virginia Inc’s**³ records on any and all Pole Inspections conducted on Pole #250, i.e. the pole at issue in this case, for the 10 years preceding August, 2003.

In response to the Request for Production of Documents, **Verizon of West Virginia. Inc.** and **Charter Communications, LLC** both responded by stating that “since the utility pole is not owed” by either utility neither had inspections performed on the Pole. The response provided by **American Electric Power** to the production of any and all Pole Inspection Records for the 10 years prior to William Smoot’s crash was **“NONE”**.⁴

3 Each of the Appellee’s names would be inserted in the respective set of Requests for Production i.e. Verizon, American Electric Power and Charter Communications.

4 Verizon’s Responses were filed on 1.6.06; Charter Communications Responses were filed on 12.5.05 and AEP’s Responses were filed on 12.2.05.

The lack of any inspections by the Appellee utility companies was expressly raised and addressed by William Smoot's liability expert, James Taylor both in his written report and during the course of his deposition. The evidence in this case is completely void of any inspection of the unmarked guy wires. Clearly, if any one of the Appellee utility companies inspected the guy wires lines in question **at any interval** the dangerous condition of unmarked guy wires could have been easily ascertained and eliminated. Obviously, the mandatory inspection safeguard set forth in the National Electric Safety Code is meant to, among other things; eliminate unreasonable risk of harm created by the unmarked guy wires. The failure to perform mandatory inspections reveals the improper and cavalier approach the utility companies have taken with regard to the legal duty owed to William Smoot, i.e. **we don't have a duty** and the failure to remedy the known defects illustrates a total lack of regard for the public safety as a whole.

VI. CONCLUSION

Appellant William T. Smoot, II, age 13, was severely injured when he crashed into unmarked guy wires on a utility pole jointly maintained by the Appellees. Since the wires are located in an area exposed to pedestrian traffic, the Appellees were required to place markers on the guy wires and the failure to do so breached the duty of due care to the Appellant. As nearly every salient fact in the case is subject to dispute and conflicting testimony, the Appellees' Joint Motion for Summary Judgment should have been denied.

VII. REQUEST FOR RELIEF

The Appellant, William Smoot, respectfully requests that this Court reverse the judgment of the Circuit Court of Kanawha County and remand this action with directions that it be reinstated on the docket of the lower court and that William Smoot's claims be adjudicated on the merits.

**WILLIAM T. SMOOT, II by his
Next friend, Kari Major
By Counsel**



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Counsel for Appellant

November 6, 2003 Kari Major
RECORDED STATEMENT: Melba Farley

Investigation

This is Roger Moles, it is November 6, 2003 and I'm speaking with a lady that lives on _____ Drive pertaining....

A. Koontz Drive

Q. Say again?

A. Koontz Drive

Q. Can you spell that?

A. K-o-o-n-t-z

Q. Okay, and with regard to any information she might have about a little boy that was injured, Kari Major's son that was injured in a bike accident. Ma'am, would you please state your full name?

A. Melba Jane Farley

Q. What's your home address?

A. 5379 Koontz Drive, Cross Lanes, WV.

Q. And your zip?

A. 25313

Q. What's your home phone number?

A. 304-776-2754

Q. Thank you. Melba, on August 12, 2003, there was a little boy that was injured, William Taylor Smoot; he was injured in a bicycle accident. Were you at home that day?

A. Yes.

Q. And, you have a side porch on your home that looks toward the telephone pole, which has the guide wires that William Taylor Smoot hit. Would you please tell in your own words what you saw that day?

EXHIBIT A

A. I just saw him as the bike hit this little stump from a bush that had been there, which was at the bottom of the guide wires. I saw the bike, like, it hit them, the bike fell backwards and he flew off the bike. And it looked like maybe his shoulder hit one of the guide wires, but he flew off the bike and down the hill. And, I assume that's where his leg broke when he landed, and then he rolled farther because, where he ended up wasn't where he first hit the ground. And, I saw him fly off the bike, but I didn't see him actually land, I didn't see him again until after he landed because I ran around the side of the porch. It happened so fast, by the time I ran around to where I could see him, the damage had been done.

Q. Okay, is this an accurate statement? When William was coming down the hill and he hit the bush, did you see...

A. The stumps of the bush.

Q. The stumps of the bush. Did you see the guide wire move at all?

A. I saw it shake a little bit when he flew off the bike; it looked like maybe his shoulder hit it.

Q. Okay, all right, thank you. Melba, in your own words, would you, if you can recount, immediately after the accident occurred, where was the bike in relation to William?

A. It was the side of the bank, um, before you get to the guide wire.

Q. Okay, is this an accurate statement? That the bicycle was lying on the side of the hill and if we're sitting at your house and we're facing the utility pole, the bike was to the left of the guide wire?

A. Yes.

Q. But the little boy was at the bottom of the hill, is that correct?

A. Yes.

Q. And, in your own opinion, what kept the bike from going on down the hill with William?

A. I, it appeared to have hit the stump that is around the guide wires. I don't know if the tire could have actually hit the guide wire, but there's a stump from the bush that used to be there. And, I'm assuming that the tire either just ran up on the stump and stopped, the tire could have hit the guide wire, but I didn't see the guide wire shake until it looked like maybe his shoulder might have hit it.

Q. Okay.

A. So, I'm guessing it could have been the stump that's right where the guide wire is.

Q. All right, thank you. Melba, were, I have a question about the exact same utility pole that William hit the guide wires on. Is it true that there was an auto accident where a car hit those guide wires as well?

A. It came to rest there where that same bush, there was a bush there, it's been since cut down, but the stumps still there. And it came to rest about that area.

Q. About the same?

A. Yes.

Q. Close to the same spot?

A. Yeah, at the same spot.

Q. And the people, if you recall, they live near you, that was driving the car, what's their last name?

A. A neighbor, I knew one of the occupants of the car, Mrs. Wilson?

Q. Do you remember her first name?

A. I'm not sure.

Q. Okay, and this occurred approximately how many years ago?

A. Uh...

Q. You can guess.

A. At least three, four, I'm not sure if it'd be as much as five, it's been a while. I didn't actually write it down.

Q. And what time of this year did this accident with the car occur?

A. It was in the wintertime, the roads were real icy and it was snowy.

- Q. And so what happened, they were coming off the hill, it appears that they lost control and they hit the same guide wires that William brushed up against?
- A. It came to stop there, yes. The car came to stop there.
- Q. Okay, thank you. Melba, I need to ask this question, then I'll go onto the next one, but, do you ever recall the telephone in question having guide markers on those guide wires?
- A. I don't remember seeing any, but I didn't exactly look for them. So, but I didn't notice them.
- Q. Thank you. Melba, immediately after the accident occurred, to the best of your recollection can you tell me what you did or any comments that William made to you?
- A. He asked me to call his Mom, and someone said to call 911 or just hollered call 911. And, I don't know if that was Will, or is friend, Andy. And, but Will for sure told me to call his Mom and he hollered the phone number out. And, he was just screaming because he was in a lot of pain, I guess.
- Q. Melba, would you please, when you went down to help William, can you tell me what you saw?
- A. He was sitting down and holding his leg up with his foot dangling down and just to show, I guess, what happened, and he was screaming. And after I had called 911 and got the tourniquet, the towel for the tourniquet, and called him Mom, I went over there to where he was at and I told him to put his foot down because I thought it might make it worse, the way he was holding it up. But, he was just in shock.
- Q. Thank you. Melba, did, in your neighborhood, is there anybody else, like your Mother who lives next door to you, is there anybody else that could have seen the accident, in as much as you know?
- A. I asked my Mom and she said that she saw the little boys, there was three of them, riding down, at least three, riding down the hill on their bikes. And she didn't see the accident actually happen. She didn't realize it until, because they were like hollering at each other and stuff like that and she didn't realize that it was severe, like it was.
- Q. Thank you. Melba, when William was coming down the hill the day that he was hurt, there were some other young men with him. Can you tell

me, to the best of your recollection; were they in a line and who was in front of whom or what?

A. I'm thinking they were around a line, I'm thinking that Andy was a little ahead of Will's little brother. But they were sort of together, but I didn't make note of that because of Will screaming and stuff and I didn't, you know, really...

Q. So, to the best of your recollection, there were some other little boys that were ahead of Will, then there was Will, and then behind them coming down the hill was Andy and Will's little brother?

A. Yes, that's my understanding, I mean my impression.

Q. And Andy's last name is Morrison?

A. I think so.

Q. All right, thank you. Melba, after the Wilson's had their accident and they hit the guide wire. Do you recall any conversations about those guide wires with the electric company?

A. I was thinking that we had called to let them know and they came out to check to see if they were stable.

Q. And so your concern was that if the car had done something to damage the guide wires that would hold the pole up, is that correct?

A. Yes.

Q. Okay, thank you. Melba, I'd like to thank you for taking time out of your day to talk to me, and I have no further questions at this time.

A. You're welcome.

10.11.03

SQUAD NAME KREAN I **MONTH** 12 **DAY** 03 **YEAR** 2003 **VEHICLE** 2317 **UNIT** 2377 **WV OEMS PATIENT CARE RECORD** P332984

STATION 23 **TRIP** 1 **INCIDENT** 1 **Patient Name** Smart, William T. **Birthdate** 1/11/45 **050890** **Patient Sex, Sec. #** 21/4-29-3231 **Auto License #** 88 **State** **1ST RESP. CAUSE** 88

Address 5315 Floradale DR **City** Cross Lanes **State** WV **Zip** 25313 **Phone** 760-4096 **Insurance #1** **Subscriber Name** **Policy/Group #** **Insurance #2** **Subscriber Name** **Policy/Group #** **Auto Ins.** **Agent** **Policy #**

Medicare Service Code: **Medicare Condition Code:** **Medicaid #** **Medicaid #**

CARE ☐ **ALS** ☐ **ALS Assessment** ☐ **ALS** ☐ **ALS 2** ☐ **Specialty Care Transport** ☐

INCIDENT CAUSE **NATURE OF CALL** 01 **TIME OF SYMPTOM ONSET OR INJURY** 1956 **TO: CAMC Gen**

MEDICAL **TRAUMA** **MOI** **AVC** **# OF MV** **MVC IMPACT** **MVC SEATING**

TIME	RESP	HR	PULSE	BP	GLAUCOMA	CONJUGAL	SCALE	CAPILLARY	REFILL	TRAUMA	SCORE	SKIN	PUPILS	CARDIAC	RHYTHM	SaO ₂	GLUCOSE	TEMP.
2008	2	91	34	110/94	4	5	6	2	1	15	W/O	PEARL	S.T.	100				
2025	22	92	125/83	4	5	6	2	1	15	W/O	PEARL	S.R.	100					
2040	20	92	144/87	4	5	6	2	1	15	W/O	PEARL	S.R.	100					

TIME	GA#	IV SITE	SOLUTION	CODE #	TIME	GA#	IV SITE 2	SOLUTION	CODE #
1. 2010	18	(D) Forearm	NS	8 Lock	22030	18	(L) Forearm	NS	8 Lock

PHYSIOLOGICAL CHART (CHECK)

☐ ASD ☐ BLS ASSISTED MEDS. ☐ BLEEDING CONTROL ☐ CPR ☐ COLD/HOTPACKS ☐ DRESSING/WOUND CARE ☐ EXTRACTOR MINUTES ☐ OB DELIVERY ☐ ORAL/NASAL AIRWAY ☐ O₂ 15 lpm ☐ NRB ☐ CANNULA ☐ OTHER ☐ PASS APPLIED ☐ INFLATED ☐ VENTILATION ☐ BAG VALVE MASK ☐ MOUTH TO MOUTH ☐ DEMAND VALVE ☐ AUTO VENT ☐ SPLINT EXTREMITY ☐ SPINAL IMMOBILIZATION ☐ SUCTION ☐ GLUCOMETER ☐ PULSE OXIMETER ☐ CARDIAC MONITOR ☐ 3 LEAD ☐ 12 LEAD ☐ CARDIOVERSION ☐ DEBRILLATION ☐ TO PACING ☐ CPAP ☐ CHEST DECOMPRESSION ☐ OC RESUSCITATION ☐ END TIDAL CO₂ ☐ FLUID BOLUS ☐ BLOOD DRAWN ☐ NG/OG TUBE

ATT. / SUCC. **CREW #**

☐ CRICOTHYROTOMY ☐ COMBITUBE ☐ E T TUBE ☐ INTRAOSSEOUS ☐ IV START ☐ PROTOCOL

TIME **MEDICATION** **DOSE / RT** **CODE #** **TIME** **MEDICATION** **DOSE / RT** **CODE #**

1 2008	O ₂	15 LNRB		4			
2 2021	Morphine	4mg IV		5			
3 2022	Phenergan	6.25mg IV		6			

AGE 13 **SEX** M **CHIEF COMPLAINT:** (D) Dispatched for Bicycle wreck inj person. (S) Rt c/o fx (R) leg (O) pt wrecked Bicycle went over hillside pt sitting up h/o L/R lower (R) leg (D) fx T5/F6 open fx h/o B/O no pt denies any other inj A to x3 (S) skin w/o color NORM pupils (O) OTVD Trachea midline 4/5 clear (O) bilat SpO₂ 100%. EKG (S) A/B/C stable P waves stable small abrasion (O) knee abrasion (O) leg unknown (O) this x unable to remove (O) shoe. (O) A/C (O) P/V: unknown (S) tx spinal motion L&B control bleeding trauma dressing Jumps (R) leg via cardboard splint. IV NS KVO 18GA (O) forearm 20cc given 18GA (L) forearm (S) while enroute removed (O) shoe (O) cap refill skin pink & feeling (S) permed buccal 4mg Morphine IV 6.25mg Phenergan IV.

Patient Condition on Arrival @ ED: ☐ Improved ☒ Unchanged ☐ Worse **Patient's Physician** UNKNOWN.

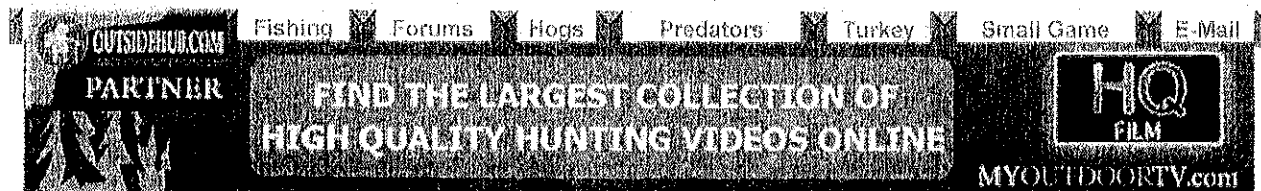
Past Hx: Seizures, Diabetes, Heart Disease, Hypertension, Stroke, COPD, Other: NONE

Pt. Meds: None **(5519.70)** **Allergies:** NKA RN Sulfon

NAME	CERTIFICATE	SIGNATURE	DATE
1. S. Nash	023727	Evo	
2. R. UNK	032217	R. Unk	
3. E. Payne	034765	Ass. st	
4.			

SQUAD 4101

EXHIBIT B

EXHIBIT C

Sunrise & Sunset Calculator

Time Zone Information

Select City:		Deg:	Min:	Sec:	Timezone Info:
Charleston, WV	Lat:	38	21	0	(ex. CST=+6):
Daylight Saving Time in Effect?	Long:	81	37	59	5
Yes					

Month:	Day:	Year (e.g. 2000):
August	12	2003

Calculate Now

Sunrise:	Solar Noon:	Sunset:
6:38AM	13:31:42	8:24PM

You can enter a your own location by selecting "Your Lat/Long" in the City pulldown box. If you will send me the Lat/Long of your area and its name I will add it to the list!

The program retrieves the current date from your computer, and fills the month, day and year fields. To perform calculations for a different date, simply select a month in the pull down menu, and enter the day and four digit year in the appropriate input boxes. When entering a day or year, you will need to click the "Calculate Sunrise/Sunset" button to update the results for this date.

Back

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IN THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

WILLIAM T. SMOOT, III, :
by his Next of friend, :
KARI MAJOR : CIVIL ACTION
Plaintiff : No. 04-C-1198

v :
AMERICAN ELECTRIC POWER, :
VERIZON WEST VIRGINIA, INC., :
and CHARTER COMMUNICATIONS, :
INC. :

Defendants :

* * *

Videotape Deposition of Russell Biundo, M.D.
Thursday, December 1, 2005

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Videotape Deposition of Russell Biundo, M.D.
Thursday, December 1, 2005

* * *

a witness herein, taken on behalf of the Defendants in
the above-entitled cause of action pursuant to notice
and the West Virginia Rules of Civil Procedure, by and
before Kathy D. Landock, Notary Public, Registered
Merit Reporter and Certified Realtime Reporter within
and for the State of West Virginia, at the offices of
Dr. Biundo, 1160 Van Voohris Road, Morgantown, West
Virginia 26505, commencing at 11:00 a.m.

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APPEARANCES:

On behalf of the Plaintiff:
CYNTHIA M. RANSON, Esquire
Ranson Law Offices, 1562 Kanawha Boulevard, East,
Charleston, West Virginia 25336
Telephone: (304) 345-1990

21 We have a mandatory residency that we have
22 to complete satisfactory, just as you would in any
23 other medical specialty. After that, you have to take
24 a board exam, initially it's a written exam; and after

0008

1 that it's an oral exam, and you have to pass them to
2 be qualified to practice physical medicine and
3 rehabilitation.

4 Now -- forgive me, I'm sorry, you want to
5 ask another question.

6 Q. What exactly is physical medicine, what is
7 your focus?

8 A. Yeah, that's what I was going to tell you.
9 Physical medicine and rehabilitation is a specialty
10 that basically was founded after World War II when
11 many of the injured soldiers would come back into the
12 United States and these patients had catastrophic
13 injuries.

14 So our specialty deals with patients who
15 primarily suffer catastrophic injuries. It involves
16 inpatient and outpatient. For example, it would
17 involve patients who have suffered a severe traumatic
18 brain injury from a car accident, a gunshot wound,
19 patients who suffer a spinal cord injury, such as
20 patients who suffer from paraplegia, paralysis of the
21 lower extremities, or quadriplegia, when all four
22 extremities are involved.

23 It also obviously involves patients who
24 suffer traumatic amputations, congenital deformities,

0009

1 anything that is categorized as being catastrophic,
2 anything that impairs or disables that individual and
3 affects their quality of life.

4 Q. What as a doctor in physical medicine do
5 you do for that person?

6 A. Well, our component is a multi-disciplinary
7 approach, which initially was very unique, now more
8 and more specialties are also using that same
9 principle.

10 There is a physical-based approach along
11 with a whole team. And the team includes physical
12 therapists, occupational therapists, speech and
13 language therapists, recreational therapists. And
14 they all work together as one unit to work on the
15 different components of the patient.

16 There's also a neuropsychological
17 component, because many of these patients obviously
18 have, you know, difficulties with depression or
19 anxiety, or in patients with traumatic brain injuries,
20 they have cognitive difficulties, difficulties with
21 thinking, difficulties with memory.

22 So my focus is to keep the patient
23 medically stable and deal with the medical issues that
24 are specific to that patient with that catastrophic

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1 injury. For example, a patient who has a spinal cord
2 injury, their physiology would be different than

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2 IN THE CIRCUIT COURT
3 OF KANAWHA COUNTY, WEST VIRGINIA
4 WILLIAM T. SMOOT, III, :
5 by his Next of friend, :
6 KARI MAJOR : CIVIL ACTION
7 Plaintiff : No. 04-C-1198
8 v :
9 AMERICAN ELECTRIC POWER, :
10 VERIZON WEST VIRGINIA, INC., :
11 and CHARTER COMMUNICATIONS, :
12 INC. :
13 Defendants :

14 * * *
15 Videotape Deposition of Russell Biundo, M.D.
16 Thursday, December 1, 2005
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0002

1 * * *
2 Videotape Deposition of Russell Biundo, M.D.
3 Thursday, December 1, 2005
4 * * *
5 a witness herein, taken on behalf of the Defendants in
6 the above-entitled cause of action pursuant to notice
7 and the West Virginia Rules of Civil Procedure, by and
8 before Kathy D. Landock, Notary Public, Registered
9 Merit Reporter and Certified Realtime Reporter within
10 and for the State of West Virginia, at the offices of
11 Dr. Biundo, 1160 Van Voohris Road, Morgantown, West
12 Virginia 26505, commencing at 11:00 a.m.
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1 APPEARANCES:
2 On behalf of the Plaintiff:
3 CYNTHIA M. RANSON, Esquire
4 Ranson Law Offices, 1562 Kanawha Boulevard, East,
5 Charleston, West Virginia 25336
6 Telephone: (304) 345-1990

11 brain injury or with regard to any growth plate issues
12 with a future x-ray.

13 EXAMINATION

14 BY MS. MEADOWS:

15 Q. Dr. Biundo, my name is Jennifer Meadows.
16 I'm here on behalf of Verizon West Virginia, Inc. I
17 just have a few questions.

18 You said yesterday that you had Will go out
19 and get on his skateboard, and he did quite well on
20 his skateboard?

21 A. Yes.

22 Q. Was that surprising to you given the
23 problems he is having with his ankle and leg?

24 A. No. Because when I tested him at the

0054

1 bedside, he looked really, really good, you know,
2 slight balance difficulties when he fully bore weight
3 on the right leg with his left leg unsupported, like
4 standing on one leg, just slight to minimal, if any.
5 But he was able to jump. He showed really good
6 response.

7 Q. With respect to the short-term memory and
8 school problems, inappropriate behaviors that Will's
9 mother told you about, did she give you any specific
10 examples of any of those things?

11 A. No, and I was not able to really decipher
12 the specifics of it either. It was not clear. I
13 think it seemed to be more a behavior problem if I
14 could say that.

15 Q. She didn't give you any specific examples?

16 A. No.

17 Q. Would those be helpful to you?

18 A. Yes.

19 Q. Would it also be helpful to maybe compare
20 those specific examples pre-accident and
21 post-accident?

22 A. Yeah. I think with Will, he's a nice boy,
23 he really is, and he's brutally honest, too. He
24 doesn't really exaggerate, he doesn't look for

0055

1 anything. I think his behavior before this is also
2 the way he is partly now, I think it's part of a
3 behavior problem that he has.

4 Q. In your physical examination, somewhere in
5 here, about three-quarters of the way down, you just
6 state simply he functions well.

7 In what sense are you speaking of, is it
8 just an overall sense that he functions well?

9 A. By that I meant, that was in regard to his
10 musculoskeletal problem with the ankle and foot. If
11 you noticed I followed by, he compensates well, and
12 although he does have weakness in the ankle plantar
13 flexors on the right compared to the left, especially
14 weak toe flexors which contribute to that, and this
15 is noted when he stands on one foot and he tries to
16 jump.

17 In other words, he does well because he

18 compensates so beautifully that it's really not
19 affecting him at this point, as children do. I have
20 children that have congenital amputations, and you
21 give them a little prosthesis, man, they fly, and
22 they'll never complain.

23 Q. So basically you're saying despite all of
24 these issues, he is still functioning at a pretty high
0056 level?

1 A. Yes, that's right.

2 Q. You also noted that he had a decreased
3 muscle mass in his right foot. Were you able to
4 determine a percentage or mild, moderate?

5 A. I didn't measure that. I have to confess,
6 I didn't measure that. It seemed to be mild when you
7 compare it.

8 Q. You recommended physical therapy for Will?

9 A. Yes.

10 Q. Do you know if Will has attended physical
11 therapy since April of 2005?

12 A. He has not. I asked him yesterday.

13 Q. Do you know why or why not?

14 A. I'm not sure. I don't know why.

15 MS. MEADOWS: That's all the questions I
16 have. Thank you.

17 MS. BLAKE: I don't have any questions.

18 MS. RANSON: I don't have any questions
19 either.

20 MS. FOX: Dr. Biundo, I know you've been
21 through this before, you have the opportunity to read
22 or sign, or you can waive that.

23 THE WITNESS: I can waive.

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1 (At 11:59 a.m., the deposition was
2 concluded. Signature was waived.)
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No.: 3306

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

WILLIAM T. SMOOT, II,
By his next of friend, **KARI MAJOR,**

Appellant,

v.

AMERICAN ELECTRIC POWER,
VERIZON OF WEST VIRGINIA, INC.
and **CHARTER COMMUNICATIONS, INC.**

Appellees.

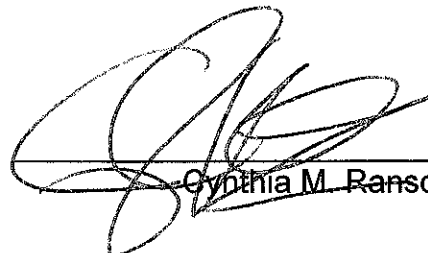
CERTIFICATE OF SERVICE

I, Cynthia M. Ranson, counsel for plaintiff, hereby certify that I have served a true and exact copy of the foregoing **REPLY BRIEF OF THE APPELLANT** on the defendants' counsel of record via United States Postal Service, on **April 11, 2008** as follows:

Ronda Harvey, Esquire
Bowles, Rice, McDavid, Graff & Love
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Charleston, WV 25325

Michelle Roman Fox, Esquire
Martin & Seibert
300 Summers Street, Suite 610
Charleston, WV 25301

Mark Hayes, Esquire
Robinson & McElwee
P.O. Box 1791
Charleston, WV 25326



Cynthia M. Ranson